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NO. 80-1690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

PAGE

I. THE FTC LACKS JURISDICTION OVER NONPROFIT PROFESSIONAL ASSOCIATIONS ORGANIZED TO PROMOTE SCIENCE, MEDICAL EDUCATION, AND THE PUBLIC HEALTH 1

A. The Act Is Inapplicable To Associations Organized To Carry On Nonprofit Programs 2

1. Petitioners Are Not Organized To Carry On Business Within The Meaning Of The FTC Act 4

2. Petitioners Are Not Organized To Seek The Profit Of Their Members 5

3. The Legislative History Refutes The FTC's Attempt To Read The Terms "Business" and "Profit" Out Of The Act 7

B. If the FTC's Jurisdictional Standard Is Rejected, Its Decision Must Be Reversed 10

II. THE COMMISSION'S DECISION AND ORDER ARE UNJUSTIFIABLE 10

A. The Refusal Of The FTC's Attorneys To Defend The Condemnation Of The 1976 and 1977 Guidelines Vitiates The Decision 10

B. The Arguments Made In The FTC's Brief Demonstrate That The Order Is Not Supportable 13

1. There Is No Likelihood That Pre-*Goldfarb* Guidelines Will Be Revived 14

2. The AMA's Purported "Long History of Illegal Behavior" Does Not Justify Entry Of An Order And Condemnation Of Post-*Goldfarb* Positions 17

3. The AMA's Approach To This Litigation Does Not Justify Entry Of An Order 20

C. Petitioners' First Amendment Claims Have Been Raised At Every Level Of This Case 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES	PAGE
American Medical Association v. *United States*, 317 U.S. 519 (1943)	18
American Medical Association v. *Weinberger*, 395 F. Supp. 515 (N.D. Ill.), *aff'd*, 522 F.2d 921 (7th Cir. 1975)	10
Andrus v. *Shell Oil Co.*, 446 U.S. 657 (1980)	9
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977)	12, 14-17, 22
Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962)	11
Community Blood Bank, et al., 70 F.T.C. 728 (1966)	6
Community Blood Bank v. *FTC*, 405 F.2d 1011 (8th Cir. 1969)	2, 6
FPC v. *Texaco*, 417 U.S. 380 (1974)	11
FTC v. *Motion Picture Adv. Co.*, 344 U.S. 392 (1953)	3
Feminist Women's Health Center v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978)	5
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	11-21
National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978)	4, 11, 13-15, 17
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947)	11
Semler v. *Board of Dental Examiners*, 294 U.S. 608 (1935)	12
United States v. *Chadwick*, 433 U.S. 1 (1977)	22
United States v. *Oregon State Medical Society*, 343 U.S. 326 (1952)	4
United States v. *W. T. Grant Co.*, 345 U.S. 629 (1953)	15

	PAGE
CONSTITUTION AND STATUTES	
United States Constitution, First Amendment .	21-22
Clayton Act, 15 U.S.C. §§12 *et seq.*	2
Federal Trade Commission Act, 15 U.S.C. §§41 *et seq.*	1-7
Sherman Act, 15 U.S.C. §§1 *et seq.*	2
MISCELLANEOUS	
Cong. Rec., October 13, 1977 (H. 33622) (remarks of Rep. Broyhill)	3, 7
51 Cong. Rec. 8844 (1914).....	9
51 Cong. Rec. 14928 (1914).....	9
H.R. 15613, 63d Cong., 2d Sess. (1914)	8
H. Rep. No. 1142, 63d Cong., 2d Sess. (1914) .	8
Matter of Ben E. Landess, M.D. (1955)	19
Newhouse, Manning, Morris, et. al., *Some Interim Results From A Controlled Trial Of Cost Sharing In Health Insurance*, 305 New England J. of Medicine 1501 (1981)	21
S. 4160, 63d Cong., 2d Sess. (1914)	8
Trade Commission Bill: Letter from Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, 63d Cong., 2d Sess. (1914)	8

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PETITIONERS' REPLY BRIEF[1]

I. THE FTC LACKS JURISDICTION OVER NON-PROFIT PROFESSIONAL ASSOCIATIONS ORGANIZED TO PROMOTE SCIENCE, MEDICAL EDUCATION, AND THE PUBLIC HEALTH.

The FTC's jurisdictional argument boils down to an attempt to rewrite the Federal Trade Commission Act. The Act gives the FTC jurisdiction over an association only if it is "*organized* to carry on *business* for its own *profit* or that of its members." It does not state that the FTC's jurisdiction extends to any entity if "substantial" and not "merely incidental" portions of its activities "engender a pecuniary benefit to its members." *Compare* FTC Br. 30. The FTC's substitution of its "some pecuniary benefit" test for the statutory language is no more and no less than a proposal to redraft the statute to accommodate its expanding regulatory objectives.

Contrary to the FTC's arguments (Br. 43-46), the only question before the Court is whether the FTC's proposed legal standard for determining its jurisdiction is correct. The answer to this question will determine the FTC's authority not only over pe-

[1]The statement required by Supreme Court Rule 28.1 is set forth at p. ii of the Joint Petition For A Writ Of Certiorari.

titioners but also over the independent nonprofit sector of our society—the many organizations which are primarily devoted to educational, scientific, or related public purposes. These include professional associations such as petitioners, the American Dental Association, and the American Bar Association, hospital associations and blood banks such as the respondents in *Community Blood Bank* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969), associations of educational institutions such as the Association of American Law Schools, and a myriad of other organizations.

While nonprofit entities are organized primarily to benefit the public, a portion of their activities inevitably promotes some economic interests of some members. If the FTC's jurisdictional standard is correct, therefore, every such organization will be subject to regulation by the agency. That Congress did not intend tnis result in 1914 or thereafter is apparent from the language, history, and purposes of the FTC Act.

A. The Act Is Inapplicable To Associations Organized To Carry On Nonprofit Programs.

The Commission contends that it would be "remarkable" if the FTC Act were not coextensive with the Sherman and Clayton Acts. FTC Br. 35, 42. A comparison of the language of the statutes, however, demonstrates that Congress did not intend the FTC's jurisdiction to be coextensive with the antitrust jurisdiction of federal courts. Congress carefully excluded from the FTC Act associations not "organized to carry on business for . . . profit . . . " By contrast, it subjected *all* associations to the contemporaneously enacted Clayton Act and to the Sherman Act. *Compare* 15 U.S.C. §44, *with* 15 U.S.C. §§7, 12; *see* Pets. Br. 18.

The FTC Act was intended to establish an administrative tribunal to supplement the Justice Department's enforcement of the Sherman and Clayton Acts against business entities organized for profit. *See* Pets. Br 19-21, 23. The Justice Department and the federal courts, however, were to retain exclusive antitrust jurisdiction over the nonprofit sector of our society. This is no

more "remarkable" than are the FTC Act's exemptions for certain business entities that are subject to the Sherman and Clayton Acts. *See* 15 U.S.C. §45(a)(2) (Banks, savings and loan institutions, common carriers, air carriers, and meat packers are exempt from FTC Act).

Indeed, exclusion of associations like petitioners from the FTC's jurisdiction was a logical corollary to the extraordinary character of the FTC Act and its stated purposes. The impetus for this legislation had been a conviction that the existing judicial enforcement of the Sherman Act against industrial and commercial entities had been inadequate. Pets. Br. 18-20. Congress believed that an agency with narrow expertise in industrial and commercial matters and with specialized nonjudicial procedures could bolster the enforcement of the Sherman Act against these entities. Pets. Br. 18-20. Congress further empowered the FTC to stop certain business practices "in their incipiency" even before there could be an assurance of an ultimate anticompetitive impact. *See FTC* v. *Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953).

The very considerations that led to the creation of the FTC require that the FTC Act be held inapplicable to the nonprofit sector. Nonprofit organizations are "different from business organizations in purpose, intent, and ownership." Cong. Rec., Oct. 13, 1977 (H. 33622) (remarks of Rep. Broyhill). They strive to benefit the public by devoting large portions of their expenditures to setting standards and otherwise promoting the public interest. Many of the most important activities of these organizations—including establishing standards for certification of professional competence, participating in the accreditation of medical and law schools, and working with others to hold down the costs of health care--could conceivably be characterized as anticompetitive. However, because of their public service dimension, the determination of whether these activities are in fact anticompetitive requires a delicate assessment of purpose and effect in which "the

usual considerations prevailing in ordinary commercial matters" may be inapplicable. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952); *see National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978). These determinations require a careful, balanced analysis, not a wooden condemnation based on standards applicable to the business sector.

A tribunal with a narrow focus and expertise and a mandate to stop practices in their incipiency is not equipped to make these delicate assessments consistent with the public interest. By Congressional design, the FTC lacks the broader perspective and procedural safeguards of a federal court. Moreover, premature challenges to activities of professional and other nonprofit associations under criteria developed in other contexts will inevitably condemn or deter conduct which, if permitted to ripen, would serve the public without suppressing competition. Not surprisingly, therefore, the language and legislative history of the Act demonstrate that Congress did not intend to subject nonprofit professional associations to FTC regulation.

1. Petitioners Are Not Organized To Carry On Business Within The Meaning Of The FTC Act.

The Commission recognizes that an association is subject to its jurisdiction only if it is "organized to carry on business" for profit as Congress used that phrase in enacting the FTC Act in 1914.[2] *See* FTC Br. 32-33. As numerous decisions of this Court and other courts reflect, no one in 1914 regarded the medical profession and its associations as carrying on business for purposes of

[2]By analyzing the key phrases of §4 separately, petitioners do not wish to obscure their interrelatedness. The statutory requirement that an association be "organized to carry on business for its own profit or that of its members" is a single limitation on the FTC's jurisdiction. The phrases "organized to," "carry on business," and "for . . . profit" are interrelated provisions that reinforce each other and demonstrate the Congressional intent to exclude the nonprofit sector from the FTC's jurisdiction.

the antitrust laws. *See Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530, 552 (5th Cir. 1978) (Wisdom, J.); Pets. Br. 22-24. The FTC does not deny this point.

Rather, the Commission attempts to confuse the issue by contending that the activities of the medical profession were a "business" within other entirely irrelevant meanings of the word in 1914. It argues (Br. 33) that one dictionary definition of business in 1914, as today, is "that which busies, or engages time, attention or labor." It also urges (Br. 33) that an entity is engaged in "business" if it receives moneys from dues or investments or for the costs of items disbursed to members or the public. As Judge Wisdom and others have consistently recognized, however, these usages have nothing to do with the meaning of "business" for purposes of the antitrust laws. Although the activity of the medical profession certainly "busies time" and involves the receipt and expenditure of revenue, the "learned professions were not [considered] 'trade', and therefore not [regarded as] subject to the federal antitrust laws [in 1914]." *Feminist Women's Health Center, supra*, 586 F.2d at 552.

In any event, the legislative history leaves no doubt that when Congress used the phrase "organized to carry on *business*" for profit in the FTC Act, it was referring to associations of manufacturers, dealers, tradesmen, and other producers. Pets. Br. 19-21, 23. The FTC concedes (Br. 40 n.35) that every reference to business during the legislative debates relates to the foregoing entities. In fact, there is not a single reference to associations of learned professions or to other nonprofit institutions even though such entities were well known to Congress in 1914.

2. Petitioners Are Not Organized To Seek The Profit Of Their Members.

In any case, no petitioner is "organized to carry on business for [the] *profit* . . . of its members." This phrase cannot fairly be read to include associations that are organized to advance public

service goals and that devote the predominant portion of their operating revenues to educational, scientific, and public health programs. An association organized for the profit of its members would never spend the bulk of its budget on nonprofit programs.

The FTC responds to the language of §4 by trying to read the terms "profit" and "organized to" out of the Act. It contends that its jurisdiction should attach to any organization if a "substantial" rather than a "merely incidental" part of its activities indirectly promotes its members' "economic interest." There is virtually no organization, and certainly no professional, scientific or educational organization, that the FTC could not treat as satisfying such a test. This is particularly so if, as the FTC suggests (Br. 35), the existence of "some pecuniary benefit" is established whenever the agency deems an organization's practices to be anticompetitive. Furthermore, because of the inherent vagueness of its test, the FTC's jurisdictional determinations would be effectively immune from judicial control.

The FTC further suggests (Br. 35) that its proposed construction of §4 is preferable to the statutory language because it does not require that an organization's activities be "segregated" and "weighed." In fact, however, under the Commission's test, "commercial" activities must be "segregated" from the "noncommercial" and then "weighed" to determine whether they are "substantial" or "merely incidental." Petitioners' approach differs from the FTC's interpretation in one respect: It gives effect to the statutory requirement that an association be "*organized* to carry on business for the *profit* of [its] members."[3]

[3]Contrary to the FTC's argument (Br. 36), the Eighth Circuit has recognized that under §4, an organization's activities must be assessed as a whole and that the existence of "some pecuniary benefits" does not establish FTC jurisdiction. It held that where an association has substantial charitable objectives and expenditures and is thus not a "device" to produce "*gain*" over members' investments, the fact that its members receive some pecuniary benefits does not satisfy the requirements of §4. *Compare Community Blood Bank* v. *FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969), *with Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 863-864 (1966).

The FTC also complains (Br. 35) that the statutory approach that focuses on "profit" means that some organizations will be exempt from its jurisdiction even though the FTC wants to regulate them.[4] However, no possible social harm can result from excluding nonprofit entities from regulation by the FTC. These organizations are subject to judicial control under the Sherman and Clayton Acts if their conduct is in fact anticompetitive. Congress intended to protect entities with significant nonprofit programs from the "detrimental and potentially debilitating effects . . . that FTC regulation could have" on their activities. *See* Cong. Rec., October 13, 1977 (H. 33622) (remarks of Rep. Broyhill).

3. The Legislative History Refutes The FTC's Attempt To Read The Terms "Business" And "Profit" Out Of The Act.

Finally, the FTC argues (Br. 37-40) that the legislative history of the Act establishes a Congressional intent to give it jurisdiction over all associations of professionals, regardless of whether they are carrying on "business" or organized to produce "gain" for their members. The basis for this argument is the FTC's suggestion that the definition of "corporation" was "expanded" by the Conference Committee to give the agency plenary jurisdiction over "all 'trade associations,' including associations of entrepreneur professionals." FTC Br. 37. This argument is based on a simple misreading of history.

The FTC's argument ignores the version of the FTC Act passed by the Senate. Section 4 of the Senate Bill explicitly stated that the "powers and jurisdiction" conferred upon the Commission shall "extend over *all trade associations* [and] corporate combi-

[4]As a practical matter, of course, petitioners' interpretation of §4 will exclude from the agency's jurisdiction only those associations, like petitioners, devoted to public service. Only these associations have such substantial nonprofit activities that they are not organized for the profit of their members.

nations" as well as "corporations as hereinbefore defined."[5] The Conference Committee thus had before it the option of giving the FTC authority over "all trade associations." Instead, the Conference Committee provided that an association would be subject to the Act if, *but only if*, it is "organized to carry on business for its own profit or that of its members." *See* Report of Conf. Comm., Statement of Managers on Part of House, H. Rep. No. 1142, 63d Cong. 2d Sess. (1914).

This history thoroughly refutes the FTC's contention. The Conference Committee plainly *rejected* legislation that would have automatically given the FTC jurisdiction over all trade associations. In no event, however, can the Committee's actions be regarded as having given the FTC regulatory authority over nonprofit professional or educational associations.[6] Rather, Congress intended that trade associations or other organizations would be subject to the Act only if they satisfy the specific statutory definition of "corporation." Against this background, it would be a mockery of the legislative intent if the Act were extended sixty-eight years later to professional associations that do not carry on

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[5]Like the version of the Act originally passed by the House, H.R. 15613, 63d Cong. 2d Sess. (1914), the Senate Bill contained a definition of "corporation." However, §4 of the Senate Bill *went on* to state that the "powers and jurisdiction herein conferred upon the commission shall extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaging in or affecting commerce, except banks and common carriers." S. 4160, 63d Cong. 2d Sess. §4 (1914).

[6]The FTC's extensive reliance (Br. 38-39) on a letter written by Joseph E. Davies of the Bureau of Corporations is misplaced. Mr. Davies' criticism of the House and Senate bills was based on his concern that these bills might not have given the FTC jurisdiction over associations of "manufacturers and dealers in various lines of business." Trade Commission Bill: Letter from the Comissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H.R. 15613) to Create a Federal Trade Commission, 63d Cong. 2d Sess. 3 (Comm. Print 1914). The change Mr. Davies proposed would not have extended FTC jurisdiction to the nonprofit sector. *Id.*

"business" within the original meaning of the Act and that, in any case, are not organized to create "profit" for their members within the traditional meaning of that word.[7]

Finally, the Congressional rejection in 1977 of the FTC's proposal to expand its jurisdiction is decisive. Not even the FTC argues (Br. 40) that this action should be ignored. Indeed, this Court has relied on comparable legislative activity in construing other statutes. *See, e.g., Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 668-72 (1980). To adopt the FTC's present position would give the agency precisely what Congress denied it in 1977: authority over any nonprofit organization the FTC seeks to reach.

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[7]The FTC's references to ambiguous statements from the floor debates, when considered in context, refute the FTC's position. The FTC (Br. 38 n.31) relies on a speech of Representative Covington in which he stated at one point that there are no organizations that are exempt from the Act. However, the FTC's quotation omits the language, from three lines earlier in his speech, that whether a particular organization is subject to FTC jurisdiction depends on "the precise method and manner of the business organization conducting the [business]." 51 Cong. Rec. 8844 (1914). Any other view would, of course, have been flatly inconsistent with the statutory language.

Similarly, a second statement of Representative Covington which the FTC quotes (Br. 29 n.34) supports petitioners when considered in context. The speech, in relevant parts, provided:

> "[The Act] confers upon the commission certain administrative powers . . . extending to persons, partnerships, and corporations and with respect to the great industrial activities in interstate commerce. It embraces every kind of person, natural or artificial, who may be engaged in interstate commerce." 51 Cong. Rec. 14928 (1914).

Quite plainly, the statement that the Act applies to "persons, partnerships, and corporations" merely tracks the terms of the Act and could not indicate any intent to apply the Act to associations that are not "corporations" within the statutory definition. Indeed, Representative Covington's statement demonstrates that nonprofit associations, such as petitioners, that are unrelated to "great industrial activities" were not intended to be subject to the Act.

B. If The FTC's Jurisdictional Standard Is Rejected, Its Decision Must Be Reversed.

If the FTC's "some pecuniary benefit" test is adopted, petitioners—and virtually all other nonprofit organizations of any size—are subject to regulation by the Commission.[8] On the other hand, if that test is rejected, the Commission's decision and order must be reversed. It is undisputed that petitioners are nonprofit associations of physicians. Substantially less than half the AMA's activities furthers the economic interests of its members—as the FTC's own expert conceded (J. App. 188-89)—and an even smaller percentage of the Connecticut petitioners' activities does so. *See* RCX 68.

II. THE COMMISSION'S DECISION AND ORDER ARE UNJUSTIFIABLE.

A. The Refusal Of The FTC's Attorneys To Defend The Condemnation Of The 1976 And 1977 Guidelines Vitiates The Decision.

The arguments of the FTC's attorneys vividly demonstrate that the Commission's decision cannot be upheld. "[A]n agency's

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[8]Petitioners acknowledge that some part of their activities does "engender pecuniary benefits" for their members. *See* Pets. Br. 3. They strenuously object, however, to the FTC's persistent attempt (Br. 3-7) to equate promoting the interests of the medical profession with furthering the economic interests of, or seeking profit for, petitioners' members. One example of the FTC's outlandish mischaracterization of petitioners' activities is its treatment of the AMA's successful 1975 challenge to federal "utilization review" regulations. These regulations required that the "medical necessity" of hospital admissions be demonstrated within one working day. Contrary to the FTC's characterization (Br. 5, Cert. App. 88a), the AMA's suit was not designed to produce economic benefit or profit for physicians. Rather, it was brought to further the interests of the profession in quality medical care. The Association challenged these regulations because the impossibility of demonstrating "medical necessity" of many hospital admissions within 24 hours would have resulted in keeping at home patients whose best medical interests required hospitalization. *American Medical Assocation* v. *Weinberger*, 395 F.Supp. 515 (N.D.Ill.), *aff'd*, 522 F.2d 921 (7th Cir. 1975). The basic point is simple: Promoting the interests of the profession is not synonymous with promoting economic interests or seeking profit.

order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' " *FPC* v. *Texaco Inc.*, 417 U.S. 380, 397 (1974), *quoting Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Yet the FTC's attorneys do not attempt to defend the decision and order on the grounds on which they rested.

The FTC's decision and order indisputably relied on a finding that the ethical guidelines issued by the AMA promptly after *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and any comparable "across-the-board bans on entire categories of representations," are insufficient to satisfy §5 of the FTC Act. Cert. App. 355a-358a, 362a. The Court of Appeals held that this finding was proper. Cert. App. 16a n.6. Petitioners' opening brief established, however, that the FTC's determination on these points is flatly inconsistent with the controlling decisions of this Court (Pets. Br. 32-36, 40-44) and, in any event, is so palpably irrational that it vitiates the FTC's order under any standard. *Id.* 39-40.[9] Although the FTC's attorneys had defended these Commission findings in the Court of Appeals (FTC Ct. App. Br. 81-85), they have abandoned these arguments here.

The reason the FTC's attorneys have not defended the Commission's condemnation of the substance of the post-*Goldfarb* guidelines is obvious. These attorneys recognize that ethical guidelines that reasonably distinguish deceptive from nondeceptive practices are lawful under the antitrust laws. *See* Pets. Br. 32-35; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978). Similarly, they recognize that on April 9, 1976, the AMA did precisely what this Court fourteen months later held that the professions should do: It adopted guidelines

[9]For example, no reasonable person could find, as the FTC did, that the AMA's 1976 guidelines "provide *no assistance whatsoever* in distinguishing" nondeceptive from deceptive advertising. Cert. App. 358a (emphasis supplied).

that are reasonably designed to define "the boundary between deceptive and nondeceptive advertising" by physicians and to assure that physician advertising "flows both freely and cleanly." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977); *see also Semler* v. *Board of Dental Examiners*, 294 U.S. 608, 612 (1935). In fact, this Court quoted extensively from the AMA's 1976 guidelines in *Bates*. 433 U.S. at 369 n.20. The FTC's belated recognition of these points is the only explanation for the failure of its Brief to discuss the standards of *Bates* and *Professional Engineers*—the controlling decisions of this Court on professional advertising and professional self-regulation.

In any event, there cannot be any serious challenge to the substantive positions taken by the AMA fourteen months before *Bates*. Unlike the Commission and the Court of Appeals, the FTC's attorneys do not quarrel with the AMA's decision to treat four specifically defined practices as unethical. They do not dispute, for example, that physician advertisements should avoid claims intended to create inflated or unjustifiable expectations of favorable results or self laudatory claims implying superior skills to physicians with similar training and backgrounds. Advertisements that state that "Doctor Jones has cured his last ten patients" (J. App. 297-98) or that feature pictures of a buxom, gorgeous woman touting her "new figure" (J. App. 455) may well be, in the words of the Court of Appeals, "fully accurate." Cert. App. 16a n.6. However, both common sense and the record in this case abundantly demonstrate that such advertisements have a dangerous capacity to mislead.[10] The record is replete with incidents in which such advertisements have deceived patients—generally the

[10]Although true, a statement that a physician has cured his or her last ten patients is meaningless and has no predictive significance. The statement indicates nothing about the difficulty of any treatment or about whether the "cure" was in fact attributable to the advertiser. J. App. 297-98. The testimony of the late Michael J. Halberstam, M.D. (J. App. 261-95) and of the late Franz J. Ingelfinger, M.D. (J. App. 296-306) demonstrate the deceptive character of these and similar types of statements in physician advertisements.

poor and unsophisticated—and led to unspeakable tragedy. *See, e.g.*, J. App. 401-453.

The refusal of the FTC's attorneys to defend a critical ground of the decision below in itself requires a reversal.[11] Their own arguments dramatically demonstrate why a reversal is mandatory. They urge that the decision should be upheld because it "will provide clear guidance to the large membership and the many constituent and component societies that make up the AMA federation and will help clarify the requirements of the law." FTC Br. 56 n.51. The "clear guidance" sent out by the Commission and the Court of Appeals, however, is that thoughtful positions seeking to differentiate deceptive from non-deceptive practices are "highly suspect," Cert. App. 362a, that canons directed against worthless testimonials, inflated promises, non-verifiable claims of superiority, or outright lies are "overbroad," "troublesome," or otherwise "worrisome," and that any comparable "across-the-board" guidelines are insufficient to satisfy §5 of the FTC Act. Cert. App. 354a-358a, 362a; *id.* 16a & 16a n.6. This so-called "guidance" is fundamentally inconsistent with *Bates* and with *Professional Engineers*. If followed, it would subvert the public interest and the objectives of the antitrust laws.

B. The Arguments Made In The FTC's Brief Demonstrate That The Order Is Not Supportable.

Unable to reconcile the Commission's disapproval of the AMA's post-*Goldfarb* positions with either *Bates* or *Professional*

[11] If the Commission had understood that the law affords no basis for treating the 1976 and 1977 guidelines as insufficient under §5, it would have recognized that there was no reason to inject itself into supervising future revisions of the AMA guidelines. No order at all is justifiable in the circumstances of this case. *See* pp. 15-22, *infra*. In any event, the agency's putative concerns could have been met by an order that merely enjoined the AMA from reviving antiquated pre-*Goldfarb* standards or that required it to take whatever additional steps the FTC deemed necessary to communicate to members that pre-*Goldfarb* guidelines had been superseded.

Engineers, the FTC's attorneys resort to analytical legerdemain. They attempt to justify condemnation of these positions without ever analyzing them. Their arguments serve only to demonstrate that no order is justifiable here. The fundamental fallacy of the FTC's position is that it ignores that *Goldfarb* and *Bates* profoundly changed the law and that the AMA conformed to the developing law promptly after *Goldfarb* and over a year before *Bates*. The impropriety of any order is further confirmed by the AMA's undisputed efforts during the past five years to continue to carry out the directive of *Bates*.[12]

1. There Is No Likelihood That Pre-*Goldfarb* Guidelines Will Be Revived.

The FTC argues that the Commission's order is necessary to protect the public from a continuation of the harmful and unlawful activities which it found to exist.[13] FTC Br. 46-50. There is no merit to this argument. In order to justify issuance of an injunctive order, an agency must establish that "there exists some cognizable danger of recurrent violation, something more than the

[12]The FTC's attorneys appear to acknowledge that the Principles of Medical Ethics adopted in 1980 and the relevant Judicial Council interpretations of these Principles in 1981 are legally acceptable. FTC Br. 56-57.

[13]If the Commission is claiming that its order only prohibits pre-*Goldfarb* practices, the argument is disingenuous. The Commission's actions go far beyond prohibiting "unlawful activities." They extend to condemnation of post-*Goldfarb* positions which even the Commission now tacitly concedes to be lawful. *See* pp. 11-13, *supra*; Cert. App. 355a-358a. Part IIA of the Order, moreover, sweeps within its terms far more than statements against underbidding and the other positions in the 1971 *Opinions and Reports*. For example, even as modified by the Court of Appeals, Part IIA appears broad enough to preclude a medical society from declaring unethical a contract by which one surgeon is paid for surgery performed by another, the practice known as "ghost surgery." Cert. App. 20a-21a. Thus even if the Commission were correct that it was justified in taking action "necessary to bring an end to unlawful practices found to exist," its decision and order in this case go well beyond this objective and cannot stand.

mere possibility which serves to keep the case alive." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).[14] The Commission has not made and could not make such a showing in this case. The decisive fact is that profound changes in professional self-regulation were wrought by *Goldfarb*, *Bates*, and *Professional Engineers*. After these decisions, it is simply ludicrous to argue, as the FTC does, that the AMA might revive ethical guidelines that prohibit any advertising by physicians or that bar contract practice.

Lacking evidence of a "cognizable danger" of recurrence, the FTC's attorneys make a series of arguments in an attempt to justify the cease and desist order. None of these arguments, however, even begins to call into question Judge Mansfield's conclusion that "[t]here is no evidence from which it might reasonably be inferred that the Association, its affiliates and members would not adhere to the revised principles in lieu of the earlier ones." Cert. App. 27a.

First, there is no substance whatever to the FTC's suggestion (Br. 52-53) that the AMA acted "tardily" in revising its ethical pronouncements in light of *Goldfarb*. The AMA's revisions began promptly after *Goldfarb* and *before* any complaint was issued. They were completed well before the trial of this case. As the ALJ found, "[t]he proposal for a new 'updated' edition of the 1971 *Opinions and Reports* was formally sanctioned at a meeting of the Judicial Council in November 1975." Cert. App. 244a; *see* J. App. 244-246. This was before the complaint was filed and well before the AMA had any indication that the FTC planned to ini-

[14]The FTC, of course, has discretion to *decline* to enter a coercive order, as *W. T. Grant* recognizes. Contrary to the FTC's argument (Br. 50), however, the agency has *no* discretion to issue such an order when there is not a cognizable danger of a recurrent violation—"something more than the mere possibility" that *must* exist to establish justiciability under Article III. Otherwise, orders could be entered that would have no practical effect other than to prohibit and inhibit socially beneficial conduct. *See* n.13, *supra*.

tiate this action. *See* J. App. 252. The AMA's revised statement on physician advertising and solicitation was issued on April 9, 1976. Cert. App. 244a. *This was fourteen months before Bates.* Far from acting tardily, the AMA anticipated the decision in *Bates.* The review process continued through 1976[15] and culminated with the publication in early 1977 (J. App. 245, 259) of an entirely new edition of *Opinions and Reports* which eliminated all outdated statements on contract practice and included instead positions to which even the Commission does not object. *This was over six months before the trial of this case.*

Second, the FTC's arguments (Br. 54-55) that the AMA's post-*Goldfarb* positions surreptitiously invited state and local medical societies to adhere to the outdated positions in the 1971 edition are contrived and erroneous. Of course, the 1976 statement on advertising and solicitation begins by noting that it "reaffirms" long-standing Judicial Council policy. FTC Br. 54. This simply reflects that the statement "reaffirms" the Association's commitment to discouraging "abusive practices that exploit patients and the public." J. App. 82. Similarly, the 1976 statement cautions that other medical societies and many states may have positions more restrictive than that of the AMA. This was a reminder to physicians that, fourteen months before *Bates*, many medical societies and a majority of states *did have* less liberal standards than the AMA had. Further, the notion that the word "solicitation" was used in order to incorporate "a thick precedential patina that conveyed to the medical profession long-established connotations of restraint" (*Id.* at 54) is nonsense. The word "solicitation" was clearly and explicitly defined in the 1976 statement to cover four deceptive practices and no more.

Finally, the fact (*see* FTC Br. 55-56) that certain AMA witnesses may have retained a personal distaste for certain forms of

[15]In the summer of 1976, for example, the Association issued major new statements on relations between physicians and licensed limited practitioners. RX 1, ¶¶3.50-3.70.

physician advertising does not demonstrate a danger that the pre-Goldfarb positions will be reasserted.[16] The practices challenged in this case are not the views of individual physicians but the activities and official positions of the AMA. There simply can be no reasonable doubt that these will continue to conform to the requirements of the antitrust laws. After *Goldfarb*, *Bates*, and *Professional Engineers*, any other course would be unthinkable.

2. The AMA's Purported "Long History Of Illegal Behavior" Does Not Justify Entry Of An Order And Condemnation Of Post-*Goldfarb* Positions.

The FTC further suggests that "the Commission's adverse findings" of a "long continued and 'deeply imbedded hostility to advertising, solicitation, and contract practice' " on the part of the AMA justifies its order. FTC Br. 46-47. This argument ignores the fact that the AMA's pre-*Goldfarb* statements were made at a time when prohibitions on professional advertising were thought to serve the public interest. *See* Pets. Br. 30. The clearest indication of the point is the FTC's own conduct. The AMA's alleged "long-standing and deeply entrenched system" was in existence from 1914 to 1975. Yet the Commission never challenged it during the first sixty-one years of its existence!

The Commission's obsessive invocation of outdated statements demonstrates only that the agency has unfairly sought retroactively to apply post-*Goldfarb*, post-*Bates* standards to conduct which took place in a vastly different legal and social climate. If the Commission is correct in asserting that an order should be entered against the Association based on pre-*Goldfarb* positions on advertising and solicitation, then a similar order should be imposed on the numerous courts, federal agencies, and state legisla-

[16] The three physician witnesses referred to by the FTC (Br. 55-56) did *not* testify that they "perceived no change" in the AMA position. Rather, on cross-examination, they were asked to express their own individual positions on some of the issues in this case. Their positions differed from those of the AMA. J. App. 391-399. It should be noted, moreover, that despite the FTC's contrary characterization (Br. 55), two of these physicians are not "members of the AMA hierarchy."

tures which adopted comparable positions in that era. *See* Cert. App. 311a-312a.

In addition, the FTC's statements concerning the "long history of illegal behavior" are hyperbole. The sweeping portions of the order directed to contract practice are based on a record which reveals no attempt by the AMA in the second half of this century to interfere with the contractual arrangements of physicians.[17] To be sure, broad statements on contract practice first made in the 1920s and 1930s did remain in the *Opinions and Reports* through the 1971 edition. By that time, however, these statements had long since ceased to reflect the position of the Association. Thus, as Judge Mansfield noted in dissent below (Cert. App. 26a-27a), "although the Association's 1971 publication of *Opinions and Reports* had contained some anti-competitive features that were objectionable from an antitrust law standpoint, these provisions had not been generally enforced; indeed, they were hardly enforced at all."[18]

[17]The most the Commission can do on this issue is to point to an incident which occurred in the 1930s and led in the early 1940s to the decision of this Court in *American Medical Association* v. *United States*, 317 U.S. 519 (1943) (FTC Br. 16). If the AMA had really tried to suppress contract practice as vigorously as the Commission contends, the record surely would contain later incidents.

[18]The record is clear on this point. Specifically, Theodore Cooper, M.D., formerly Assistant Secretary for Health in the Department of Health, Education, and Welfare, had heard of no medical society opposition to the employment of physicians by, or reimbursement methods of, any Health Maintenance Organization (Tr. 6070-72). John Porterfield, M.D., for many years the chief operating officer of the Joint Commission on Accreditation of Hospitals, had encountered only one allegation of medical society objection to such practices, an allegation that could not be substantiated (Tr. 5514-15). Mervin Shalowitz, M.D., a physician actively involved in the HMO movement, had not heard of any medical society objection to any HMO (Tr. 4883-86). A 1977 FTC staff report on "The Health Maintenance Organization And Its Effects On Competition" concluded that HMOs have not encountered significant medical society opposition for decades (RX 803, pp. 6-8). Indeed, an FTC survey of HMOs turned up very few, if any, allegations of medical society resistance to the employment or reimbursement methods of HMOs (RX 824-872).

It is true that state or local medical societies did on occasion attempt to influence the contractual arrangements of a local physician. Significantly, however, the AMA was not involved in those incidents.[19] To the contrary, the AMA Judicial Council approved physician advertising and contract practice in the only instance in the past thirty-five years in which it considered these issues in the context of a specific case. *Matter of Ben E. Landess, M.D.* (1955), J. App. 17-22. *See* Pets. Br. 9 n.7.

Finally, every AMA activity that the FTC characterizes as suggesting unlawful conduct (FTC Br. 12-17) took place in 1869, 1932, 1965, 1971, and other years before 1975.[20] These activities were abandoned promptly after *Goldfarb*. *See* J.App. 253-259. There is absolutely no likelihood that they will be repeated in today's vastly different legal and social climate.

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[19]The FTC's attorneys do their best to confuse the distinction between the AMA and state and local medical societies by using such well-chosen phrases as "the AMA federation" (FTC Br. 10, 57), "AMA and its affiliates" (*Id.* at 9, 12, 17), and "AMA's federated affiliates" (*Id.* at 20). Even repeated use of such phrases, however, cannot change the fact that state and local medical societies are autonomous organizations which act independently of, and generally without knowledge by, the AMA. Tr. 3950, 3956. Thus, the Commission's sweeping actions cannot be justified by the fact that after issuance of the 1976 statement, two local societies reprimanded physicians for advertising and one society took action against a physician who engaged in contract practice. FTC Br. 55 n.49. These actions simply reflect the fact that such societies are autonomous and act independently of the AMA.

[20]The latest activity to which the FTC points is distribution "as recently as June 1974" of "a model physician-hospital contract requiring that professional fees be based upon traditional independent practice." *Id.* at 17. Similarly, the frenzied and misleading *amicus curiae* brief of Ohio and other states is obsessed with pre-*Goldfarb* conduct. Significantly, the record contains no evidence that the AMA disseminated the old model contract after 1975, and in fact it did not. Indeed, the record is clear that promptly after *Goldfarb* the AMA ceased all activities that might have been regarded as violative of the antitrust laws. *See* testimony of Bruce Nortell, Secretary of the AMA Judicial Council, J. App. 253-259.

3. The AMA's Approach To This Litigation Does Not Justify Entry Of An Order.

Finally, the FTC accuses the AMA of maintaining a "shifting litigation posture" (FTC Br. 48 n.44) and urges that this somehow justifies its order. These arguments are a diversionary tactic without the slightest substance.

The Association's "litigation posture" has remained the same throughout this case. The AMA has consistently urged that it should be judged on the basis of its post-*Goldfarb* positions and that findings of liability should not be based on the outdated and disavowed statements in the 1971 *Opinions and Reports*. Five years ago, for example, in January of 1977, the AMA formally asked the Commission to reconsider issuance of the complaint on ground that its 1976 statement on advertising and its then soon-to-be-issued positions on contract practice were in the public interest and should control the disposition of this case. J. App. 1-9. *See also* AMA Ct. App. Br. 56. This has been the AMA's position throughout this litigation. Therefore, *it has never defended the substance of the 1971 Opinions and Reports*. The Commission expressly found (Cert. App. 340a) that the "AMA does not really defend the statements contained in the 1971 edition."

As petitioners' opening brief stated, the AMA did contend that it should not be held responsible for actions of state and local societies in which it was not involved. *See* Pets. Br. 9 n.7. It also maintained that neither its 1971 positions nor its 1977 guidelines were shown to have had an adverse effect on competition in terms of higher fees, lower quality, or reduced availability of physicians.[21] All the while, the Association argued that it was improper to base liability on the disavowed 1971 *Opinions and Reports*.

[21] In its Brief in this Court (p. 28), the Commission for the first and only time in this case cites economic data on the health care sector of the economy. Apart from being outside the record, this citation highlights a fundamental failure of proof on the part of the Commission. The agency

(Footnote continued on following page)

Finally, contrary to the FTC's assertion (Br. 48 n.44), the AMA's position on mootness has never changed. The Association has never contended that the entire case is moot. It recognized below that the Commission could, if it wished, adjudicate the lawfulness of post-*Goldfarb* positions. The AMA's unchanged position was and is that "any challenge to pre-*Goldfarb* guidelines has long [been] moot" (Pets. Br. 38) because there is no likelihood these statements will be revived.

C. Petitioners' First Amendment Claims Have Been Raised At Every Level Of This Case.

The FTC's argument (Br. 57-58) that petitioners have waived their First Amendment claims is startling. Petitioners have argued throughout this case that an FTC order will violate the First Amendment to the extent that it prohibits or inhibits ethical guidelines that reasonably distinguish deceptive from nondeceptive practices.

The AMA made precisely this argument in its appeal of the ALJ's decision to the Commission. There the issue was whether the AMA should be required to rescind its 1976 and 1977 guidelines, to refrain from promulgating any other guidelines during the next two years, and to obtain prior Commission approval before promulgating any new guidelines thereafter. *See*

(Footnote continued from preceding page)
has never offered a shred of economic evidence to suggest that the positions of the AMA at any time have raised physicians' fees, lowered the quality of medical care, or decreased the accessibility of physicians. The economic data it cites in this Court shed no light whatsoever on this crucial issue. Rather, rising costs in the health care field are attributable to many complex factors, including the prevalence of third party payment mechanisms. See Newhouse, Manning, Morris, et. al., *Some Interim Results From A Controlled Trial Of Cost Sharing In Health Insurance*, 305 New England J. of Medicine 1501 (1981). What little evidence there is in the record on this point indicates that the kinds of practices condemned in the AMA's post-*Goldfarb* positions raise the costs and dramatically decrease the quality of medical care. *See* Tr. 6920-6999, 7031-7120; J. App. 261-95.

AMA Br. to FTC, 63-80. In the Court of Appeals, the AMA made a nearly identical "overbreadth" argument that the Commission's order violated the First Amendment because it inhibited pro-competitive speech and because the 1976 and 1977 statements fully satisfy the policies of §5 and the directive of *Bates*. AMA Ct. App. Br. 68-82, 104-11.[22] This argument was explicitly presented in the Joint Petition for a Writ of Certiorari (pp. 21-22) and was comprehended within the second of the questions presented (*Id.* at i). However, the best response to the FTC is Justice Brennan's statement concurring in *United States* v. *Chadwick*, 433 U.S. 1, 16 (1977):

> "[I]t is deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments."

[22]The FTC (Br. 57 n.52) refers to the AMA's First Amendment argument in the Court of Appeals on Part II of the Order. AMA Ct. App. Br. 97-104. It is difficult to understand how the FTC can ignore that the next seven pages of the AMA Brief (*Id.* at 104-111) made an "overbreadth" argument under the First Amendment and that earlier in the Brief the AMA argued that the 1976 and 1977 guidelines were valuable speech that promoted competition and fully complied with the directive of *Bates* (*Id.* at 68-82).

CONCLUSION

For the reasons stated in this reply brief, as well as those in petitioners' opening brief, the decision of the Court of Appeals should be reversed and the decision of the Federal Trade Commission should be set aside.

Respectfully submitted,

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